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In the

# Supreme Court of the United States

October Term, 2002

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CARL L. JAMES; RANDY DERRYBERRY; RALPH SACCAMANNO; BRUCE GATES; ALLEN BOWER; R. L. GARRISON; UNION PACIFIC RAILROAD COMPANY GENERAL COMMITTEE OF ADJUSTMENT; ET AL.,

*Petitioners*,

v.

INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED LABOR ORGANIZATION,

*Respondent*.

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*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

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## PETITION FOR A WRIT OF CERTIORARI

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70 pp

## QUESTIONS PRESENTED

Whether a local union has a right to jury trial and to have ordinary summary judgment standards applied to its claims (upon decidedly mixed facts) that the parent union breached its duty of fair representation via grossly improper election procedures and denial of appeal rights in violation of its own constitution and the Railway Labor Act, 45 U.S.C. § 152.

Whether a local union has a right to jury trial and to have ordinary summary judgment standards applied to its claims (upon decidedly mixed facts) that the parent union discriminated against the local union in violation of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(1).

Whether a trial court can obviate summary judgment standards in a labor case by applying instead a simple "not unreasonable" standard to evaluate union conduct even if that conduct violates the union's own constitution.

## PARTIES TO THE PROCEEDING

There are no parent entities or subsidiaries.

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Petitioners Carl L. James; Randy Derryberry; Ralph Saccamanno; Bruce Gates; Allen Bower; R. L. Garrison; and Union Pacific Railroad Company General Committee of Adjustment; et al., ("petitioners") respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals was reported at 302 F.3d 1139 (10th Cir. 2002), and is set forth at Appendix, pp. 1a-32a. The underlying opinion of the district court was not reported.

## JURISDICTION

The judgment of the court of appeals was entered on August 27, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(1) provides as follows:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings,

subject to reasonable rules and regulations in such organization's constitution and bylaws.

## STATEMENT OF THE CASE

### A. Factual Background

#### 1. Summary, and History of IBLE Constitutional Amendments

Petitioners comprise a local union called a "general committee of adjustment." Respondent ("IBLE") is their international union, with headquarters in Cleveland, Ohio.

For many years, the IBLE in Cleveland had assumed the power to merge and extinguish local unions without the permission of the members whose rights were obviated. However, in 1991 the IBLE Constitution and Bylaws (§ 34(a)(1)B of the "Standing Rules") was amended to make the merging of general committees of adjustment subject to the vote of the affected members of each general committee [the section number was changed from § 34 to § 33].

Thus, if the membership of any single general committee voted against a proposed merger with another general committee, they could not be forced to merge. Said language stood the test of time, was not amended thereafter at the Sixth Quinquennial Convention in July 1996, and remains the constitutional law of the IBLE today, as follows:

> The committees involved in the merged systems may be consolidated, if

necessary, to meet the representational requirements of the membership.

The officer assigned shall submit his recommendations to the International president. If the recommendation is to merge the involved committees, the International President shall forward said recommendation with all facts in support to the involved general committees. The affected general committee(s) shall refer the question to the membership under their jurisdiction by instructing each affected division to prepare a paper ballot to be delivered within sixty (60) days to each member of the division . . . . The ballots shall be counted by each division at the first regular division meeting following the date for return of the ballots. . . . If it is the decision of the majority not to merge their GCA's [general committees], their individual GCA's shall continue as heretofore.

In the instant case, its very wording as well as the legislative history underscoring this IBLE constitutional amendment created a fact issue for jury determination of Petitioners' rights, as follows:

As early as 1985, the IBLE recognized that affected members of a general committee of adjustment had a right to vote on such mergers of their general committees of adjustment. In 1986, the IBLE affirmed that a merger of general committees of adjustment required an election procedure involving only the

members of the affected committees of adjustment. But in late 1986, the IBLE was considering so-called "forced consolidation" of general committees of adjustment. On December 26, 1986, the general chairman of the General Committee of Adjustment wrote that an old but still effective section of the Standing Rules of the IBLE Constitution ([§ 4(a)] "provides that subject to a two-thirds majority vote of approval of each general committee involved, a merger of general committees shall become effective 60 days from date of such approval if no appeal is submitted concerning such action being taken." Thus, pursuant to the long-standing interpretation of the IBLE Constitution by the IBLE itself, a merger vote was confined to each general committee involved -- and the merger vote was not opened up to the entire union membership.

In addition, appeal rights from such merger procedures were traditionally permitted and authorized by the IBLE pursuant to its own Constitution and Bylaws.

In July 1990, IBLE vice president C. V. Monin mentioned a review of the Constitution and Bylaws [§ 34 -- Standing Rules] regarding so-called forced mergers. Monin drafted a letter in which he appeared to be ordering (or would soon be ordering) a merger of general committees of adjustment "[p]ursuant to the provisions of Section 34 -- Standing Rules of the Constitution and Bylaws. . . ." However, on the same day, the IBLE president, L. D. McFather, discussed a proposed merger "pending the acceptance of the majority of divisions involved." Thus, McFather appeared to reaffirm the long-standing principle that the

majority of each affected committee had approval (or veto) rights. By August 1990, a procedure for obtaining the voting approval of each affected committee in a proposed merger was still being employed. But in October 1990, IBLE president McFather stated his view that committee mergers could be affected in two different ways, forced or voted (unforced). The latter was pursuant to § 34 of the Standing Rules of the Constitution and Bylaws, enacted at the union's First Quadrennial Convention in 1966, McFather said.

By 1991, the membership was sufficiently concerned about forced mergers that the topic was taken to the Fifth Quinquennial Convention in Cleveland's Music Hall (from August 19 through 24, 1991). Eight committees of the IBLE banded together in 1991 and introduced resolutions to amend the IBLE Constitution and Bylaws to require that no committee of adjustment could be merged without approval of its own membership. The pertinent language was as follows: The question of merger would be put to a vote of the affected members and, "If it is the decision of the majority not to merge their General Committees of Adjustment their individual General Committees of Adjustment shall continue as heretofore."

A related resolution was also introduced: "However, in the event the International President has reason to believe that the merging of a small G. C. of A. would be in the best interest of the members he shall forward the request with all facts in support of his position to the affected General Committees requesting they voluntarily agree to the merger. The final decision will

rest with the affected members of the involved Committees as per section 4. (a) above."

Upon introduction of this resolution, it was concomitantly interpreted as follows: "Under this resolution, the President would never be able to merge any small General Committee."

Pertinent comments included the following: "My members feel the International President shouldn't have the right to merge General Committees against their will. It is no secret in this organization, in the last several years several General Committees have been merged against their will. I do not feel this is to the benefit of the membership. So I want to go on record as saying Division 115 supports the resolution, and that's it." [comments of Brother Chenchar]. Other comments:

--"I don't believe the International President should interfere with the size of any general committee as such." [comments of Brother White].

--"My committee, my membership expects me to also relay their feelings that the division should have their own fate in their own hands, not in the hands of the International President." [comments of Brother Baxter].

--"Our divisions have felt the effect of a forced merger [of] General Committees, and we are in favor of keeping the committee mergers in the hands of the membership, not the International." [comments of Brother Myers].

--"We feel it is up to the membership as to whether the GCAs are consolidated or not." [comments of Brother Smith].

The constitutional committee to which this resolution was submitted for consideration had previously recommended its defeat. But when the resolution came up for vote, the membership passed it, defeating the committee recommendation (and with a round of applause noted in the minutes). There was not a single vote supporting the committee's effort to kill the resolution.

Thus, when a similar amendment was proposed for § 33(a)(1)B -- Standing Rules, the committee recommended its adoption. The amendment was concomitantly interpreted as follows: "If the members of the general committee want to remain separate, it shouldn't be forced on them by the International."

The resolution passed unanimously and thus, at the Fifth Quinquennial Convention, the IBLE Constitution and Bylaws were amended so that the International president could never again force a merger without the approval of the membership of each affected general committee.

A member of the very constitutional convention committee that recommended the constitutional amendment, Petitioner James, submitted an affidavit to the trial court in this case, which stated, "Section 32(a)(1)(B) [sic] was created specifically to prevent a majority from extinguishing the rights of a minority . . . ."

**2. The International IBLE then ignored the Constitution and Bylaws and merged and extinguished Petitioners' committee of adjustment over its members' objection.**

By 1997, then IBLE president Monin was contemplating mergers again, but he reaffirmed the requirement that each affected committee must vote in favor of a merger before it could be effective. Monin: "Briefly, it [the IBLE Constitution] requires a majority vote (by referendum) of the membership of each division party to the proposal to merge. . . . If all divisions vote in favor of merging, application is made to this office for approval."

But when it came to Petitioners, particularly Petitioner James and his general committee of adjustment, Monin took an opposite position. He tried to force James' general committee of adjustment into agreeing to merge general committees after four railroads were consolidated (on July 3, 1996, the Union Pacific merged with D&RGW, Southern Pacific Transportation Company, and St. Louis Southwestern Railway Company). Monin threatened, "Nevertheless, should it become apparent that the assistance of the ID [IBLE] is necessary to resolve any difficulties, I will certainly provide it."

This was a threat to return to the old days of forced mergers. And, in time, Monin unilaterally declared that he was reorganizing the general committees and, further, that he had decided that Petitioners' committee (the UP General Committee) would no longer have any right to handle the disputes of its own members.

Petitioners attempted by conciliation and informal appeal to reverse the steps being taken by Monin. But all informal appeals internally within the IBLE were denied and rejected by Monin and his assistants. As a last resort, Petitioners took a formal appeal to the IBLE Board of Appeals in Cleveland. This was on or about February 3, 1999. Said formal appeal sought among other things to overturn wrongful actions by Monin and the IBLE in denying or limiting the authority and jurisdiction of Petitioners (a) to represent their members, (b) to handle the employment disputes of their members, (c) to not suffer a change in representational authority without a proper vote of the membership as provided for in the IBLE Constitutional and Bylaws, (d) to continue to be the legally authorized bargaining agents for engineers on the former merged railroads, D&RGW and Southern Pacific, and (e) to determine seniority disputes within the Salt Lake City Hub and Denver Hub.

After full and complete briefing and consideration of the evidence by the IBLE Board of Appeals in Cleveland, Petitioners prevailed in the appeal. On or about January 20, 2000, the IBLE Board of Appeals ruled in favor of Petitioners and against the IBLE, finding that the IBLE had wrongfully undermined the authority of the UP General Committee to represent its members.

The IBLE Board of Appeals found that the IBLE wrongfully undermined the UP General Committee by essentially and wrongfully ignoring Petitioners and their legal right to represent their own members. The IBLE Board of Appeals wrote that these actions "did,

indeed, act to undermine the ability of [James] to fulfill his duties and obligations as a general chairman in all respects and as contemplated by the Constitution and Bylaws of the IBLE."

The IBLE Board of Appeals also found that for there to be a merger or consolidation of general committees in the representation of the rank-and-file IBLE membership resulting from a railroad merger as in the instant case, "each member represented by an affected general committee will have a vote on whether or not the recommended consolidation/merger will take place." In completely upholding James' position, the IBLE Board of Appeals wrote:

> The Board finds that the delegates at the Fifth Quinquennial Convention acted to modify then-Section 34.-Standing Rules, Sub-section (a)(1)B. (now re-designated Section 33), to provide that, before any merger/consolidation of general committees takes place pursuant to a railroad merger (such as Union Pacific/Southern Pacific), each member represented by an affected general committee will have a vote on whether or not the recommended consolidation/merger will take place."

The IBLE Board of Appeals wrote further:

> The Board finds, absent the approval of the membership of affected general committees, that the act of redefining the territorial scope of

> collective bargaining agreements does not automatically redefine the territorial jurisdiction of general committees. Such can only be accomplished through the application of Section 33(a)(1)B-Standing Rules.

On February 23, 2000, the International president wrote to the Union Pacific Railroad itself to report the IBLE Board of Appeals decision in James' appeal, stating as follows:

> In essence, IBLE's Appeals Board held that the D&RGW General Committee and its Chairmen retain their rights and obligations to represent its members and to function as such within the merged Denver and Salt Lake City Hubs until accomplished under Section 33 (a)(1)B - Standing Rules of the Constitution and Bylaws of the IBLE.
>
> Therefore, pursuant to sections 2 Third and Fourth of the Railway Labor Act, kindly recognize Chairman James as the designated representative of the aforedescribed employees of Union Pacific for all purposes under Sections 3 and 6 of the Act until otherwise notified by this Office.

Even though he had won a major victory and caused to be written a powerful legal interpretation of the IBLE Constitution and Bylaws, Petitioners knew that Cleveland would eventually attempt anew to

disenfranchise Petitioners. James noted: "It has been a problem. It's like playing chess with someone who makes up the rules along the way. We knew the International would try it some other way -- some other way that would also be in violation of the Constitution and Bylaws. It just took them awhile to cook it up."

James had been a reformer within the union and an advocate of obedience to the Constitution and Bylaws, which Constitution and Bylaws had been ignored over the years by those whom it would legally restrict in their exercise of power. James was the chairman of the 1991 Constitution and Bylaws committee that worked to democratize the IBLE.

Petitioners initiated a recall election against Monin and succeeded in getting him recalled by a vote of the rank and file throughout the United States. When Monin was recalled from office as president, he was replaced by close colleague, vice president Dubroski, who himself announced that he would continue to rearrange the general committees -- *but this time Petitioners would have no appeal.* Thus, Dubroski decided to create a new system of voting on the merger of general committees, which system was (a) designed to eliminate the right of Petitioners' committee, and (b) designed to sidestep the requirements of the IBLE Constitution and Bylaws. The steps required by § 33(a)(1)B of the Constitution and Bylaws were ignored.

**3. None of the IBLE's actions in eliminating Petitioners was supported anywhere in the IBLE Constitution and Bylaws.**

Dubroski's new method of combining general committees is nowhere mentioned in the IBLE Constitution and Bylaws. He simply imposed his new scheme, as described in a letter to all general committee chairmen on the Union Pacific. Pursuant thereto, Dubroski sent out a system-wide general ballot, with the assertion that all committees could and should vote on all committee mergers. Thus, the votes of a general committee in the Union Pacific's Southern Region (or anywhere else) could cancel out the votes of Petitioners' tiny committees in Colorado and Utah.

The voting results were predictable. The large committees voted to obviate, extinguish and absorb the small ones, and the vote of the small ones to decide their own fate was for naught. All of Petitioners' divisions except one (Division 451 in Denver) voted against the forced merger (Divisions 29 in Pueblo, Colorado; Division 488 in Grand Junction, Colorado; Division 713 in Salt Lake City, Utah; Division 888 in Helper, Utah).

Thus, the total voting of those divisions of which James was chairman (and which divisions had elected James pursuant to the IBLE Constitution and Bylaws) was as follows:

IN FAVOR OF MERGER
30 votes.
AGAINST MERGER
73 votes.
ABSTAIN
4

But the IBLE quickly announced that the merger would go through anyway. A list was prepared of the large committees that extinguished the small committees. At the same time, Dubroski met substantial protests from the small committees, who believed this scenario could never occur after the Fifth Quinquennial Convention and amendment of § 33(a)(1)B of the Constitution and Bylaws. One general chairman confronted Dubroski with a list of written questions to highlight his unconstitutional acts, including: "Will the members of each Committee have the right of decision to merge their Committee as per Section 33(a)(1)?" To which, Dubroski responded: "This is a complete reconstitution of the general committees on the Union Pacific property, with no currently existing general committee retaining its present structure. The majority of ballots cast will determine whether the recommendation passes or fails."

The pertinent language of the IBLE Constitution and Bylaws regarding merger procedures refers to the "affected general committee(s)" and then describes an election *within* each "affected division", stating, "The ballots shall be counted by each division at the first regular division meeting following the date for return of the ballots . . . . If it is the decision of the majority not to merge their GCA's [general committees], their individual GCA's shall continue as heretofore." *See*,

IBLE Constitution and Bylaws, "Standing Rules" § 33(a)(1)B.

Thus, Dubroski interpreted the above language to permit large committees of adjustment to swallow smaller committees of adjustment at will.

**4. The International IBLE then denied Petitioners their constitutional appeal rights.**

Pursuant to the legislative history of mergers in years past, the general committees of adjustment had always been afforded meaningful appeal rights, and so Petitioners sought to have Dubroski reverse and void his own unconstitutional actions. But Dubroski declined and rebuffed such communications. Dubroski declared that his actions were unappealable: "Consequently, your request to appeal my decision in accordance with Section 44 - Constitution is prohibited."

Nonetheless, Petitioners went ahead with an appeal within the union, exhausting all possible internal administrative procedures. The appeal included the request: "Therefore you may consider this a request to appeal your 'actions' relative to the 'consolidation of the general committees on merged properties'."

The IBLE then simply ignored and rejected the appeal. It asserted that the merger destroying Petitioners' general committee was simply unappealable, and in so acting the IBLE claimed to be relying upon the same provision of the Constitution and Bylaws [§ 33(a)(1)B] that the IBLE was sidestepping in the first place: "As you know, Section 44(a)(1) -

Constitution clearly 'excepts' from the appeal process decisions and interpretations of the International President made under Section 33(a)(1) A, B, C, D, - Standing Rules. . . . Therefore, I cannot accept your appeal."

Thus, the IBLE created a fiction, i.e. that its actions in destroying the small committees of adjustment were pursuant to § 33(a)(1) B. But they were actually *in derogation of* § 33(a)(1) B. The IBLE's new method of having a nation-wide vote is nowhere described in the IBLE Constitution and Bylaws or in § 33(a)(1) B. Thus, it was incongruous for the IBLE to fall back on § 33(a)(1) B to declare its actions simply unappealable pursuant to § 44(a)(1). Note: § 33(a)(1)(B) says nothing about restructuring of the entire union system. It is confined solely to mergers or consolidations of existing general committees. Nowhere therein is restructuring of the entire system, as the IBLE accomplished in this instance, mentioned as triggering the election provisions of § 33(a)(1)(B).

The IBLE created a Question-and-Answer Sheet in response to letters of inquiry and complaint and it included the following:

> "Question No. 1:
>
> "'Will the members of each Committee have the right to decision to merge their Committee as per Section 33(A)(1)?'

"Answer:

"This is a complete reconstitution of the general committees on the Union Pacific property, with no currently existing general committee retaining its present structure. The majority of ballots cast will determine whether the recommendation passes or fails."

Thus, what the IBLE imposed was not the mere merger or consolidation of one or more general committees as described in § 33(a)(1)(B). Rather, all of the general committees were dissolved and destroyed -- not just plaintiffs' general committee -- and new regional units were created (six of them) by geographic region (Northwest Region, Western Region, Southwest Region, Southern Region, Central Region, Northern Region). In sum, the IBLE's actions were not pursuant to § 33(a)(1)(B), and thus Petitioners' normal appeal rights should never have been abrogated on such a basis.

**5. The IBLE then created a new and unconstitutional appeal procedure -- and denied that one to Petitioners as well.**

The IBLE then created a new appeal procedure never before seen in the union and not provided for anywhere in its Constitution and Bylaws. The IBLE announced on December 28, 1999 that the new appeal procedure would consist of a mediation before the IBLE executive committee and thereafter before an

"umpire" with authority to issue a final and binding decision. The traditional appeal procedure set forth in the Constitution and Bylaws was thus obviated by Cleveland. Nonetheless, Petitioners decided to try to invoke the new appeal procedures -- and they were flatly denied that right as well.

Thus, on March 12, 2000, Petitioners wrote to Dubroski and filed two different appeals:

> a. First, the appeal to which they were entitled pursuant to § 44 of the Constitution and Bylaws.
>
> b. Second, the appeal that the IBLE recently created. Petitioners wrote: "Now this brings us to the paragraph "D" on page three of your December 28, 1999, letter addressed to all Union Pacific General Chairmen [language of said letter omitted]. Therefore, please be advised that it is requested that this GCA be granted an appeal per this section "D". An immediate reply to this request will be appreciated." Said alternative appeal was also sent to the IBLE appeals board.

Petitioners were not granted the latter appeal, just as they were not granted the former. The IBLE simply declined to process the appeal, stating that it was unclear what was being appealed. This response was despite the specificity of the appeal -- an appeal of all "actions" relative to the "consolidation of the general committees on merged properties." In addition, Petitioners were exhaustively explicit in their other

correspondence seeking to invoke any and all appeal rights.

**6. The election was unconstitutional for other reasons as well.**

The action of the IBLE in conducting the *ultra vires* election to merge general committees was in derogation of § 33(a)(1)(B) of the Constitution and Bylaws for other reasons as well. Section 33(a)(1)B requires that merger elections be conducted in a certain precise manner, including:

> a. The election question was to be referred to the membership of the "affected" general committee by the general committee itself (not by the IBLE).
>
> b. Each Division was then to prepare its own ballot.
>
> c. Each ballot was to be accompanied by "the written recommendation of the International President, [and] the written recommendation of the affected general Chairmen. . . ."
>
> d. The election was supposed to be by secret ballot.

None of these mandatory steps was followed by the IBLE. The non-secret ballots went out from Cleveland in contravention of the Constitution and Bylaws, and

the written recommendation of the affected general chairmen, including Petitioners, were left out.

### B. Proceedings in the District Court

Petitioners maintained this action pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.*; the National Labor Relations Act, as amended, 29 U.S.C. § 151 *et seq.* (including 29 U.S.C. § 185); and the Labor-Management Reporting and Disclosure Act of 1959 [LMRDA], 29 U.S.C. §§ 411-412. After a period of discovery, the Respondent filed its motion for summary judgment seeking dismissal of the entire case. The magistrate judge recommended granting the motion in its entirety, and the district court judge adopted the recommendation. Petitioners then appealed to the court of appeals for the Tenth Circuit.

### C. Decision of the Court of Appeals

The court of appeals upheld the magistrate judge and the trial court and affirmed summary judgment as to all claims.

## REASONS FOR GRANTING THE PETITION

A LOCAL UNION HAS A RIGHT TO JURY TRIAL AND TO HAVE ORDINARY SUMMARY JUDGMENT STANDARDS APPLIED TO ITS CLAIMS (UPON DECIDEDLY MIXED FACTS) THAT THE PARENT UNION BREACHED ITS DUTY OF FAIR REPRESENTATION VIA GROSSLY IMPROPER ELECTION PROCEDURES AND DENIAL OF APPEAL RIGHTS IN VIOLATION OF ITS OWN CONSTITUTION AND THE RAILWAY LABOR ACT, 45 U.S.C. § 152, AND THAT THE PARENT UNION DISCRIMINATED AGAINST THE LOCAL UNION IN VIOLATION OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT, 29 U.S.C. § 411(A)(1).

The court of appeals appears to have set aside ordinary summary judgment standards in order to determine as a matter of law (and despite decidedly mixed facts) that the IBLE's actions were "not unreasonable" and therefore were unchallengeable in every respect under any theory of law.

The Petitioners' right to enjoy ordinary summary judgment procedures should not have been abrogated under a general reasonableness standard by which the trial court rendered itself the trier of fact, determined whether the parent union's conduct was "not unreasonable" and thus removed the case from jury determination.

In so doing, the court of appeals has created a rule of law that a larger local union in the United States can

vote to swallow up a smaller local union at will. Indeed, it can do so despite the contrary wording of the union's own constitution and bylaws, and despite a contrary legislative history. The court of appeals determined that this outcome and the procedures leading to it were "not unreasonable" and thus were unchallengeable, and it did so against a summary judgment standard in which all reasonable inferences were supposed to be taken in favor of the non-movants, i.e. Petitioners -- but were not.

Moreover, the court of appeals has rendered a decision that an international union can unilaterally create and announce new election and election appeal procedures so long as they pass the same "not unreasonable" standard, even if the new procedures are in derogation of the union's own constitution and bylaws.

Such a decision should not stand, as it will become the basis of a significant shift away from constitutional democracy within America's labor organizations.

It is apparent that the court of appeals took the facts, and all inferences therefrom, in favor of the summary judgment movant, instead of the Petitioners as required by summary judgment procedures. Thus, it was inarguable, for example, that Petitioners were denied all of their appeal rights from the IBLE decision to eliminate their local union (both the long-standing constitutional appeal rights and the ad hoc appeal rights recently fabricated by the IBLE, which supposedly supplanted the constitutional appeal rights).

As to the latter, it is undisputed that Petitioners were denied the ad hoc appeal rights recently fabricated by the IBLE. Thus, Petitioners were left with no appeal rights whatever regarding an action that extinguished their very existence. The court of appeals disposed of this denial even of the ad hoc appeal rights recently fabricated by the IBLE with one decisional sentence: "Nor can we say that his [the IBLE president's] refusal to grant plaintiffs any other right of appeal was unreasonable." *See, James*, 302 F.3d at 1149. There was no other appellate analysis on this paramount issue, no legal or factual basis for such a conclusion by the court of appeals. *Id.*

Thus, the court of appeals has established a precedent that a parent union in America can eliminate any local union it wants and deny the victim any and all appeal rights -- *without explanation* -- and such action is deemed *per se* reasonable (or "not unreasonable") by the court of appeals.

By any reading of the facts in this case, there was a long-standing right of appeal against such IBLE action, and it was rooted, if not expressly set forth, in the IBLE Constitution and Bylaws. By any reading of the facts in this case, the IBLE simply declared that it was no longer affording the constitutional right of appeal to Petitioners. Thus, the IBLE announced instead that it was creating new and different appeal rights (even though not provided for anywhere in the Constitution and Bylaws) -- *but even they were denied to Petitioners in their entirety.*

Any reasonable person viewing these facts would most certainly conclude that the *total* denial of appeal

rights in this fact pattern was patently and egregiously *unreasonable,* not to mention unconstitutional. Yet, the court of appeals could not say that the refusal "to grant plaintiffs any other rights of appeal was unreasonable." *Id.* It thus upheld everything that the IBLE did in this case.

In so doing, the court of appeals turned summary judgment standards on their ear. First, it shifted the burden to the Petitioners to show that the total denial of appeal procedures was unreasonable (a burden that was nonetheless met by Petitioners). It was in fact the IBLE's burden to show that its action in totally denying an appeal was so reasonable (if reasonableness be the proper standard, which it was not) that no reasonable person could disagree on the issue. Second, the court of appeals supplanted the jury and decided, without explanation, that denying even the newly created appeal rights was not unreasonable. On such controverted facts, this decision was inexplicable. Unfortunately, the Petitioners' only remedy is the instant Petition which, if denied, will open the door for such undemocratic and unconstitutional conduct by parent unions against their locals unions throughout the land.

Similarly, the IBLE obviated the union's constitutional election procedures which required that the ballot be secret and contain both the election position of the IBLE as well as the election position of the local chairmen. Thus, the official platform for presentation of the contrary election position of any local chairmen was denied to the local chairmen, and the ballot went out as if the election issue and IBLE position out of Cleveland were universally acceptable, omni-beneficial and inarguably enact-able. The court

of appeals likewise found this to be not unreasonable (even against summary judgment standards) or too *de minimus* to be concerned about, calling this and similar abrogations of Petitioners' election rights "fairly minor derogations." *See, James*, 302 F.3d at 1150. To the contrary, any reasonable person would unequivocally find that getting an election position statement effectively "on the ballot" going out to each and every voter was significant if not huge, in modern parlance. Keeping it off the ballot was grossly damaging to Petitioners' position and their election rights in opposing the forced merger coming out of Cleveland. Moreover, the right to a *secret* ballot is a substantive right of great consequence. These rights were provided for in the IBLE Constitution and Bylaws but trashed in order to destroy certain local unions, including Petitioners.

The court of appeals' decision on this point does paramount damage to the American labor movement, as it reverts to a day of official-dominated elections in which dissent was stifled and election results were made to appear pre-ordained. Certainly, when all inferences from such evidence are viewed in a light most favorable to the non-movants upon a motion for summary judgment, the denial of such election rights to Petitioners in this case was patently unreasonable (if that be the new-found standard), plainly unconstitutional (the old standard), and certainly not "fairly minor," as the court of appeals wrote.

Finally, the court of appeals ignored the plain language of the pertinent merger election provisions, which provided for voting by only *the affected* local unions, with a majority of each required to effect their

own merger. Taken in a light most favorable to the summary judgment non-movants (Petitioners), including with all reasonable inferences therefrom, such action was unconstitutional *and* unreasonable. There was no reasonable explanation for permitting local unions 2,000 miles away to out-vote and *ipso facto* extinguish a local union in Colorado or Utah with which they were not merging.

The court of appeals' decision demonstrates and discusses deference to the policy of not intervening in internal union activities. Petitioners have not quarreled with such a policy. However, such deference does not obviate or alter the application of normal summary judgment standards to labor litigation in America. Petitioners were fairly entitled to application of the principle that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In the instant case, the court of appeals did not apply such standards and, instead, sat as a super-jury to pronounce that what the IBLE did to Petitioners in this case was either reasonable or, as the court of appeals stated it, "not unreasonable." This was as a matter of law and solely because, as the court of appeals wrote, there was a deference toward non-interference with internal union activities. Such an appellate ruling should send a shutter through all who

have fought to democratize American labor. The court of appeals has written a blank check for anti-local-union activity premised upon a hazy "not unreasonable" standard in derogation of the union constitutions themselves.

Apart therefrom, the issue of whether the IBLE's actions in this case were reasonable or unreasonable (if that be the proper analysis, which it was not) was unfairly taken out of the jury's hands on decidedly mixed evidence and in derogation of Petitioners' right to a trial by jury assured by the Seventh Amendment to the United States Constitution. Said amendment assures the right to trial by jury for not just common law claims but legal claims created by Congress as well. *Chauffeurs Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, (1990). The right to trial by jury should not be vitiated by a judicial policy of reluctance to interfere in internal union affairs, especially if there is a fact issue as to whether such union affairs in extinguishing the life of a local union are constitutional, unconstitutional, unreasonable or "not unreasonable."

The Labor-Management Reporting and Disclosure Act of 1959 [LMRDA], 29 U.S.C. §§ 411-412 assures rank-and-file members democratic participation in intra-union affairs, such as voting, running for election, and approving or challenging official union policies and decisions. *See, Aircraft Mechanics Fraternal Association v. Transport Workers Union of America, Local 514*, 98 F.3d 597, 600 (10th Cir. 1996). Section 411(a)(1) was enacted to forbid invidious discrimination against union members with regard to their right to vote. *See, Calhoon v. Harvey*,

379 U.S. 134 (1964). Denying Petitioners their appeal rights -- all appeal rights -- regarding the effect of their votes and the flawed election in which their votes were cast was *ipso facto* a denial of their right to vote.

Moreover, attempts to silence dissent within a union, even by use of lawful means, is forbidden by the LMRDA. *See, Schermerhorn v. Local 100, Transport Workers Union*, 91 F.3d 316, 323 (2d Cir. 1996) [union members are protected by LMRDA against "a scheme to suppress dissent"]. Pursuant to *Schermerhorn, supra*, "A scheme to suppress dissent exists when as a result of established union history or articulated policy . . . a purposeful and deliberate attempt is made by union officials to suppress dissent within the union." [citations omitted].

In the instant case, a purposeful scheme of suppression of dissent was shown by Petitioners' submissions on motion for summary judgment (including all reasonable inferences embodied in those submissions). Included were the following acts by the IBLE: unilaterally declaring that the UP General Committee no longer had any right to represent its members ; acts in furtherance of said scheme; officially and unofficially divesting the UP General Committee of its authority to represent its own members; denial of all informal appeals; breaching earlier promises that there would be no action to modify existing representation of the general committees; denying the mandate of a formal appeal that Petitioners had already won; backing off and then trying a new tactic to divest Petitioners of their constitutional rights; creating a new and

unconstitutional voting method; further ignoring and denying any formal appeal rights; reorganizing the general committees in breach of the IBLE Constitution and Bylaws by making the elimination of local unions subject to the vote of all local unions, including those not affected; failing to investigate the above wrongdoings; failing to represent Petitioners in good faith; taking actions with the particular intent of destroying the representational authority of Petitioner James, who had successfully dissented with and challenged the actions of the IBLE in the past (including by campaigning successfully for a recall of the IBLE president); and a continuation of such wrongful, illegal and unconstitutional conduct, including the suppression of free speech rights.

Pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, ["RLA"] a union majority may not sacrifice the legitimate rights of a minority, and the RLA has been interpreted as protecting minority rights. *See, Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944). Indeed, Petitioners have shown for summary judgment purposes, and especially when all reasonable inferences are to be taken in their favor, that they possessed clearly defined rights pursuant to the IBLE Constitution and Bylaws, which rights were trampled in straightforward fashion by the IBLE in Cleveland. The RLA "contemplates resort to the usual judicial remedies" for breach of the duty not to discriminate against a union minority. *Id.*, at 207.

Application of the new "not unreasonable" test articulated by the court of appeals in the instant case would effectively obviate minority rights as well as constitutional rights in American unions, and it would

do so by casting out normal summary judgment standards to deny Petitioners their Seventh Amendment right to trial by jury.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 25, 2002

# APPENDIX

# APPENDIX

[Filed August 27, 2002]

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
No. 01-1257

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CARL L. JAMES; RANDY DERRYBERRY; RALPH SACCAMANNO; BRUCE GATES; ALLEN BOWER; R. L. GARRISON; UNION PACIFIC RAILROAD COMPANY GENERAL COMMITTEE OF ADJUSTMENT; JOHN DOES 1 - 286 WHOSE IDENTITIES ARE CURRENTLY UNKNOWN,

Plaintiffs-Appellants,

v.

INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated labor organization,

Defendant-Appellee.

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 00-Z-683)**

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Submitted on the briefs:

John R. Olsen of Olsen & Brown, L.L.C., Niwot, Colorado, for Plaintiffs-Appellants.

Harold A. Ross of Ross & Kraushaar Co., L.P.A., Cleveland, Ohio, and Michael S. Wolly of Zwerdling, Paul, Leibig, Kahn & Wolly, P.C., Washington, D.C., for Defendant-Appellee.

Before **SEYMOUR, McKAY**, and **MURPHY**, Circuit Judges.

**SEYMOUR**, Circuit Judge.

This case involves a dispute between a union that consolidated its internal structure and one of its local affiliates eliminated by that consolidation. The union constitution requires mergers of local affiliates to be approved by a "majority" of members from the "affected" affiliates. Union members voted overwhelmingly in favor of the consolidation undertaken here, but a majority of the plaintiffs' affiliate opposed it. Interpreting a "majority" to mean a majority of all votes cast, rather than a majority from within each local unit, the union implemented its proposal. Plaintiffs, whose local was dissolved and merged with another, filed this lawsuit asserting that the union's interpretation was unreasonable and that its actions therefore violated the union constitution and various of

plaintiffs' rights. The district court granted summary judgment to the union. Plaintiffs appeal and we affirm. FN1.

> FN1. After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

## I.

## FACTUAL BACKGROUND

The individual plaintiffs are locomotive engineers employed by the Union Pacific Railroad. Until 1996, they worked for the Denver & Rio Grande Western Railroad, a subsidiary of the Southern Pacific Railroad. The associational plaintiff, to which all of the individual plaintiffs belong, is the Union Pacific General Committee of Adjustment (the plaintiffs' committee). Based in Pueblo, Colorado, it is a subordinate entity of a larger railroad union. Until the events giving rise to this lawsuit, it was designated by its parent organization as the collective bargaining representative for its members.

Defendant is the parent union, the International Brotherhood of Locomotive Engineers (BLE), headquartered in Cleveland, Ohio. Founded in 1863, the BLE is North America's oldest railroad labor union. Once limited to locomotive engineers, its membership now includes other railroad employees and its total membership in the United States and Canada numbers 35,000.

The origins of this dispute lie in the 1996 merger between the Union Pacific Railroad and the Southern Pacific Railroad (including their subsidiary railroads), from which an expanded Union Pacific emerged as the surviving railroad. FN2. Part of a trend toward greater consolidation in the railroad industry, the Union Pacific Southern-Pacific merger has spawned internal union conflict in a number of areas, including the determination of seniority status and the location of employee home terminals. *See, e.g., Swonger v. Surface Transp. Bd.,* 265 F.3d 1135, 1137 (10th Cir.), *petition for cert. filed,* 70 U.S.L.W. 3444 (U.S. Dec. 18, 2001) (No. 01-93). The current dispute stems from the union's decision to restructure its local affiliates that directly service workers on the newly enlarged Union Pacific, a move that eliminated several small general committees of adjustment across the western United States, including the plaintiffs' committee. These smaller committees were merged with others to form larger regional affiliates.

FN2. Railroad mergers must be approved by the Surface Transportation Board, the successor to the Interstate Commerce Commission. Authorized to exempt the involved carriers from antitrust laws, the Board must find that the proposed merger is in the public interest and offers adequate protections to displaced railroad workers before it can approve the transaction. 49 U.S.C. §§ 11324-26. The Board approved the Union Pacific-Southern Pacific merger in August 1996, subject to a five-year oversight period. *See Hagerman v. United Transp. Union,* 281 F.3d 1189, 1192 (10th Cir.2002).

The general committees of adjustment, or GCA's as they are sometimes called, are a creation of the BLE constitution. Their powers and duties are set forth in a section of the constitution entitled "Standing Rules," as are the conditions under which a new committee may be established. The union contends the primary purpose of a committee is to administer a collective bargaining agreement. [FN3] Aplee. Br. at 6. That contention is central to the union's position because the merger between Union Pacific and Southern Pacific eliminated several collective bargaining agreements, including the contract that formerly covered the members serviced by the plaintiffs' committee.

Accordingly, the loss of these collective bargaining agreements sparked a struggle over the future role of the GCA's that administered them, including plaintiffs' committee.

> FN3. The Standing Rules provide a GCA may be established "[o]n any system of railroad where two (2) or more divisions are organized" and on any subsidiary road or branch that "constitutes a separate department of the system ... on which the BLE has separate and distinct schedules of pay ..." Aplee. App. at 23.

Section 33 of the Standing Rules anticipates that a railroad merger may warrant the dissolution or consolidation of one or more committees. Under a heading entitled "Mergers, etc.," Section 33 states: "The committees involved on the merged [railroad] systems may be consolidated, if necessary, to meet the representational requirements of the membership." Section 33(a)(1)(B)-Standing Rules. (Section 33 of the Standing Rules is attached as an appendix to this opinion.) The rule requires a majority vote of the affected union membership to approve such a consolidation, and it sets out the terms and procedures that guide an election.

As we discuss in detail below, the parties differ on a single issue: Which majority governs a

consolidation election under the terms of Section 33? The union contends only a majority of the entire voting membership is required to approve consolidation, while plaintiffs maintain a majority from each committee must be obtained.

Before the merger between Union Pacific and Southern Pacific could win government approval, the union and the railroad were compelled to negotiate and adopt so-called "implementing agreements." One of the topics addressed by the implementing agreements was the replacement of existing collective bargaining agreements with newly-created agreements. Under the terms of these implementing agreements, the territory covered by the plaintiffs' committee, whose members worked for the then-existing Denver & Rio Grande Western Railroad, was split into two regions or "hubs": a Salt Lake City hub and a Denver hub. New collective bargaining agreements for each hub now cover employees from several of the merged railroads. These contracts replaced the contract formerly administered by the plaintiffs' committee. Union contracts covering other workers from the merged railroads were similarly affected.

As a result of these changes, the union had a greater number of committees than collective bargaining agreements. Then-BLE President Clarence Monin decided it might be desirable to consolidate the eleven committees serving the enlarged Union Pacific to correspond with the

consolidated union contracts. He directed union vice president Edward Dubroski to explore the issue. *Id.* at 663. In his resulting report, Dubroski recommended that while "in time ... a case could be made in favor of consolidating committees," in the meantime the international should "continue to let the General chairmen work things out among themselves with our assistance." *Id.* at 664. In response, President Monin merely encouraged other committees to voluntarily consolidate, but with respect to plaintiffs' committee he effectively stripped it of jurisdiction over the applicable collective bargaining agreements by declaring a different committee the representative and agent of all members under the new agreements. *Id.* at 696-97.

The plaintiffs' committee appealed to the BLE Board of Appeals. It charged that the president's actions triggered Section 33 of the Standing Rules and therefore required a vote of the membership. [FN4] The Board of Appeals agreed, ruling that the president's unilateral move constituted an effort to force a committee merger and therefore "each member represented by an affected general committee [must] have a vote on whether or not the recommended consolidation/merger will take place." *Id.* at 697. The Board expressly refused to take a position on the "methodology" by which the election must be governed and therefore did not address whether a majority of all votes or a majority of each

committee's membership was necessary to approve a merger of committees. *Id.*

> FN4. The Board is authorized to review certain actions of the union president. *See* Section 44(a)(1)-Standing Rules, quoted in Aplee. Br. at 7 n. 3.

Even before the Board of Appeals announced its decision, plaintiff James, chairman of the plaintiffs' committee, launched a nationwide campaign to recall President Monin. His efforts were successful. In 1999, the rank and file voted to remove Monin as BLE president. Union Vice-President Edward Dubroski succeeded his former boss on August 1, 1999.

Now-President Dubroski continued the effort to consolidate the Union Pacific committees. He convened a meeting of the chairs of all the committees to attempt to forge a voluntary agreement to consolidate, but the chairs, some of whom would have been forced to surrender their positions, were unable to reach a consensus. Dubroski also attempted to convince Union Pacific management, in the wake of the decision by the BLE Board of Appeals, to recognize plaintiff James as the bargaining agent of the employees he represented before the railroad merger. Union Pacific refused, asserting that the merger-related accords negotiated between the railroad and the union permitted only one

representative for each collective bargaining agreement and that Union Pacific had recognized the chair of a different committee as the representative for James' members.

Dubroski next proposed consolidation in a letter sent directly to members:

> While no one likes change-it creates much pain-we simply have to restructure our general committees for reasons of economy, efficiency, sound business principles and effective representation. The maintenance of eleven (11) separate committees, or even more as some suggest, is too costly and would require increases in dues or even debt. Furthermore, the committees must be formed in a fashion that they can provide strong, adequate and unsplintered representation for all members within their geographic jurisdiction. Only through the changes recommended in my decision below could we be reasonably assured of a financially stable, healthy organization on Union Pacific that will meet the present and future needs of you, the members, in negotiating agreements and enforcing them.

Aplee.App. at 25. Dubroski proposed restructuring the existing eleven committees into six. Each new committee would cover a distinct geographic area, larger than any of the previous

committees, and each would administer similar collective bargaining agreements within its territory. The letter also stated that a vote on consolidation would be conducted according to the process provided in Section 33(a)(1)B.

All eleven committees were, according to the language of Section 33, "affected" by the proposal, so ballots were sent to all BLE members on the Union Pacific system. An overall majority of members approved Dubroski's plan by a vote of 2,401 to 425. However, a majority of members covered by plaintiffs' general committee voted against the merger. With these results, Dubroski announced that the entire consolidation plan had been approved and would be implemented, thus eliminating plaintiffs' GCA.

Plaintiff James, on behalf of himself, his membership, and his committee, notified President Dubroski of his intent to appeal the results of the election, contending that under Section 33 a committee cannot be dissolved and merged with another committee unless a majority from each committee consents. President Dubroski refused to submit the appeal to the BLE Board of Appeals, asserting that the Section 33 election result was not subject to appeal because Section 44 of the union constitution excepted actions taken under Section 33(a)(1) from the appeals process.

II.

## DISTRICT COURT PROCEEDINGS AND STANDARDS OF REVIEW

After President Dubroski rejected their appeal, plaintiffs filed this lawsuit. The complaint alleged that the union's use of a straight majority vote to decide the outcome of the restructuring election was contrary to the process mandated by Section 33 of the union constitution, thereby violating the Railway Labor Act's duty of fair representation, *see* 45 U.S.C. § 152, and the union members' Bill of Rights set out in the Labor-Management Reporting and Disclosure Act, *see* 29 U.S.C. § 411. The complaint also alleged breach of contract and promissory estoppel under state law. Adopting a lengthy recommendation from the magistrate judge, the district court granted summary judgment in favor of the union on the federal labor claims and held the state law claims preempted by the Railway Labor Act.

We review de novo the district court's grant of summary judgment, which is warranted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). We review the evidence in the light most favorable to the nonmoving party, in this case plaintiffs. *Jurasek v. Utah State Hosp.,* 158 F.3d 506, 510 (10th Cir.1998).

In this internal union dispute, two additional principles underpin our decision. The first is that judicial interference in intra-union affairs should be undertaken with great reluctance. *Lucas v. Bechtel Corp.*, 800 F.2d 839, 850 (9th Cir.1986). Second, "[a]bsent bad faith or special circumstances, an interpretation of a union constitution by union officials ... should not be disturbed by the court." *Teamsters Joint Council No. 42 v. Int'l Bhd. of Teamsters,* 82 F.3d 303, 306 (9th Cir.1996) (quotation and citation omitted). These principles rest on a strong federal policy in favor of union self-governance. *See generally Local Union No. 657 of the United Bhd. of Carpenters v. Sidell,* 552 F.2d 1250, 1255-56 (7th Cir.1977).

## III.

## THE DUTY OF FAIR REPRESENTATION

Plaintiffs charge that the union dissolved their committee and stripped its chairman of any authority to negotiate on their behalf with the railroad. They contend this conduct violated the union's internal constitution and breached the duty of fair representation.

The Supreme Court has recognized an implied duty of fair representation under the Railway Labor Act. *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202-07 (1944). This duty is breached when a union's conduct toward a

member or group of members is "arbitrary, discriminatory, or in bad faith." *Rucker v. St. Louis Southwestern Ry. Co.*, 917 F.2d 1233, 1238 (10th Cir.1990) (quotation and citation omitted). While the duty does not reach purely internal union affairs, it does extend to matters regarding a union's role as the collective bargaining agent for its members, including the negotiation, administration, and enforcement of collective bargaining agreements. *Distler v. United Mine Workers,* 711 F.2d 76, 79 (7th Cir.1983).

The magistrate judge expressed some hesitance as to whether plaintiffs' claim implicates the duty of fair representation. We agree that the question is a close one because it involves internal union matters. But because the plaintiffs attack the voting procedures employed by the union, alleging that newly formulated, unlawful procedures diluted their vote and deprived them of their designated bargaining representative, we conclude that their complaint is sufficient to state a claim for breach of the fair representation duty. [FN5]

> FN5. In light of our concerns, we sought and received supplemental briefing from the parties on this issue. As indicated, we are persuaded the plaintiffs did plead a justiciable claim because they allege that the union's voting procedures denied them fair

representation. *See Steele,* 323 U.S. at 200 (implying a statutory duty of fair representation and noting that racially discriminatory membership rules "deprived" black railroad workers "of the right, which they would otherwise possess, to choose a representative of their own"); *see also Davenport v. Int'l Bhd. of Teamsters,* 166 F.3d 356, 361 (D.C.Cir.1999) (noting that " 'the discriminatory denial of the right [to vote in contract ratification election] may be inconsistent with a union's [duty of fair representation].' *American Postal Workers Union, Local 6885 v. American Postal Workers Union, ('Postal Workers'),* 665 F.2d 1096, 1105 n. 20 (D.C.Cir.1981).")

Turning to the dispute, "[i]t is well settled that the relationship existing between a trade union and its members is contractual and that the constitution ... constitute[s] a binding contract...." *Adams v. Int'l Bhd. of Boilermakers,* 262 F.2d 835, 838 (10th Cir.1959). The meaning of a provision in the union constitution must be viewed in light of the overriding "federal policy of noninterference in internal union affairs." *Fulk v. United Transp. Union,* 160 F.3d 405, 408 (7th Cir.1998). "We defer to a union's interpretation of its own constitution so long as the interpretation is not unreasonable." *Id.* at 407. "[W]e must be

able to call the interpretation unreasonable, perhaps even patently unreasonable, before we can set it aside." *Id.* at 408 (quotation omitted). In addition, we regard the President's interpretation as the union's construction. [FN6]

> FN6. The BLE constitution indicates that the union president's interpretation of the constitution is "the union's" interpretation: under a heading titled "Duties of the International President," section 7(b) of the constitution specifically grants the president the authority and responsibility to "render interpretations of the law of the BLE." Aplee. App. at 5.

Section 33(a)(1)-Standing Rules is part of the BLE constitution. The rule begins by requiring the union president, upon notice "that a merger [or] consolidation" in the railroad industry will occur, to "assign an officer for the purpose of directing the committees in the handling [of the matter] to the best interests of the members involved." *See* Section 33(a)(1). It continues by stating that committee consolidation may be necessary in response to a railroad merger, and sets out the procedures governing any such consolidation. *Id.* at (a)(1)(B). The relevant provisions read:

> The committees involved on the merged systems may be consolidated, if necessary,

> to meet the representational requirements of the membership.
>
> The officer assigned shall submit his recommendations to the International President. If the recommendation is to merge the involved committees, the International President shall forward said recommendation with all facts in support to the involved general committees. .... *If the decision of the majority is to merge the committees in question,* the International President shall notify the affected general committees of the decision and [arrange for the election of new officers]. .... *If it is the decision of the majority not to merge their GCA's, their individual GCA's shall continue as heretofore.*

*Id.* (emphasis added). As we have said earlier, the parties read these words quite differently. The union interprets the phrase "of the majority" to mean a majority of the total votes cast. Plaintiffs argue "of the majority" refers to a majority of each separate committee.

The rule fails to identify unequivocally which majority shall control the outcome of the vote. We recognize our task is not to determine the true or correct meaning of Section 33 nor to decide which of the two competing readings of "majority" is the better one, but only to decide whether the union's interpretation is reasonable. *Laturner v. Burlington N., Inc.,* 501 F.2d 593,

599 (9th Cir.1974). Our determination of reasonableness is a legal one. *See Lucas,* 800 F.2d at 850 ("The controversy before us is a legal one: was the IBEW's interpretation [of its constitution] reasonable and made in good faith?").

We conclude the union's interpretation of Section 33 is reasonable. The rule contains a syntactical clue suggesting that "the decision of the majority" refers to a majority of the voting membership as a whole. It states that "[i]f it is the decision of the majority not to merge *their* GCA's, *their* individual GCA's shall continue as heretofore." Section 33(a)(1)(B) (emphasis added). The use of the plural possessive pronoun ("their," as opposed to "its") undermines the notion that each separate committee retains a veto. It also points to a broader set of relevant decision-makers, since "their GCA's" denotes the existence of at least two committees and suggests that the "majority" necessary to effect a decision "not to merge" comes from more than one committee's membership.

Moreover, there is no clear textual support for plaintiffs' interpretation of Section 33. This lack of support is particularly conspicuous in light of plaintiffs' earlier, unsuccessful attempt to amend the rule to align it with the interpretation they assert now. In late 1997, a local division of the BLE based, like the plaintiffs' committee, in Pueblo, Colorado, circulated a petition seeking support for an effort aimed at rewording Section

33. The proposed amendment would have made clear that "the committees involved may not be merged unless all of the involved committees agree," and would have eliminated some of the syntactical flaws discussed above. Aplee. App. at 127. For instance, the amended rule would have read: "If the decision of *each separate committee* is to merge the committees in question, [the merger shall proceed].... If it is the decision of *one of the committees involved* is [sic] not to merge their GCA's, their individual GCA's shall continue as heretofore." *Id.* at 127-28. Plaintiff James sent these amendments to the chairmen of all BLE general committees, urging them to support "Division 29's efforts to insure that your members and ours have the final say in their destiny." *Id.* at 130. Section 33 was not amended, however, failing to gain the currency necessary to be submitted to the rank and file for a vote.

Plaintiffs also point to what they call the legislative history of Section 33, claiming it reveals a clear intent to require majority approval from the membership of each committee before any such committee can be dissolved and merged with another. The record on which they rely comprises a history of the bitter relationship between small committees and the central union, much of it predating the enactment of Section 33. To the extent it is relevant, we are not convinced.

As an initial matter, plaintiffs lean heavily on comments made by delegates to the 1991 convention that drafted and ratified Section 33,

comments like those made by Brother Chenchar, who said: "My members feel the International President shouldn't have the right to merge General Committees against their will." Aplt.App., vol. III at 442. Brother Myers expressed similar feelings: "Our divisions have felt the effect of a forced merger ... and we are in favor of keeping the committee merge[r]s in the hands of the membership, not the International." *Id.* These remarks and others like them, cited extensively in plaintiffs' briefs, reveal no more than a desire to abolish the president's authority to force a merger without a vote of the membership. They are not inconsistent with the union's actions here because they do not indicate conclusively the outcome of this internal debate.

In addition, the comments quoted above were directed not at Section 33 but at a different constitutional rule, what became Section 4(c) of the Standing Rules. *See id.* at 441. Under the dubious proposition that the legislative history of one provision illuminates another, plaintiffs call Section 4(c) a "related" rule. Yet Section 4(c) is significantly different from Section 33. Section 4(c) relates to the desire of "a General Committee of Adjustment on any *small* road or system" to merge with another committee against that committee's wishes. *Id.* (emphasis added). We are not confronted with a committee "on a small road or system," nor do we face a committee seeking to merge without the assent of the acquiring committee. Moreover, the meaning of Section 4(c) is more under-determined than that of

Section 33; it says only that "[t]he final decision will rest with the affected members of the involved Committees." *Id.*

Plaintiffs also question whether resort to Section 33 was even appropriate, given the scale of the resulting changes. They assert that because the union intended to restructure its entire internal organization, the rule did not cover the election since it speaks not to a wholesale realignment but only to mergers of existing committees. We defer to the union's broad definition of the rule because it is neither unreasonable nor contrary to law or policy. The rule itself contains no express limit on its scope, and it repeatedly calls its contemplated response to such a unique event a "consolidation." The plan approved by the union membership, it seems to us, represents a fairly typical, if extensive, "consolidation" plan. It reduces the number of existing committees, combines and enlarges geographic territories, and requires the election of officers to head the newly created committees, all in correspondence to the changes brought about by the underlying merger. The consolidation therefore appears to be reasonably within the scope of Section 33.

Our conclusion that the union reasonably interpreted Section 33 does not end our inquiry. Even if a union's action is authorized under its constitution, it may still breach the duty of fair representation. *Local No. 48, United Bhd. of Carpenters v. United Bhd. of Carpenters,* 920 F.2d 1047, 1053 (1st Cir.1990). Thus, we still

must determine, in light of the union's interpretation, whether the union breached the duty of fair representation, that is, whether its conduct was "arbitrary, discriminatory, or in bad faith." *Rucker,* 917 F.2d at 1238.

Given our belief that the union's interpretation of the rule was reasonable, we reject the argument that its conduct was arbitrary. Nor do we agree that the union discriminated against plaintiffs or singled-out their general committee. All BLE members on the Union Pacific, including the individual plaintiffs, were given an equal vote, and four other committees in addition to plaintiffs' were eliminated as a result of the union's merger vote.

We likewise find no evidence of bad faith on the part of the union or any union official, despite plaintiffs' argument that the elimination of his committee through a membership vote was a continuation of the campaign plaintiffs allege former President Monin undertook against Mr. James and his committee for "being a thorn in the side of the International BLE." Aplt.App., vol. II at 178. To the extent that James himself has been an irritant, the person who bore the brunt of his offense was President Monin, whom James toppled in a successful recall election. There is no evidence of personal animus in this record between James and Monin's successor, Edward Dubroski, who called for and presided over the challenged election. The union contends its officials were motivated solely by the rational

concern of how best to preserve the union's strength in the face of sweeping changes in the railroad industry, and plaintiffs have advanced little or no evidence to contradict this. Plaintiffs therefore fall short of the legal standard for establishing bad faith, which in this context requires evidence that "union officials acted contrary to the International's best interest, out of self-interest, or in an unconscionable or outrageous way." *Teamsters Joint Council No. 42,* 82 F.3d at 306.

In addition to its decision about which "majority" governs a Section 33 election, plaintiffs also allege that the union breached the duty of fair representation in two other respects. First, they claim that President Dubroski violated this duty by refusing to consider their internal administrative appeal. They rely on Section 44(a)(1)-Constitution, which provides that the BLE Board of Appeals "shall have authority to render a final and binding decision on all appeals from decisions and interpretations of the International President." Aplee. App. at 2. However, they ignore language in the rule that "excepts," among other things, decisions and interpretations arising under Section 33(a)(1) of the Standing Rules. *Id.* President Dubroski cited this language in rejecting plaintiffs' appeal. We cannot say his interpretation of the rule was unreasonable in light of Section 44's clear language. Nor can we say that his refusal to grant plaintiffs any other right of appeal was

unreasonable.

Second, plaintiffs assert that President Dubroski's failure to include position statements from the general chairmen along with the ballots provided to the rank and file members and the fact that the International (Dubroski), rather than committee chairs, sent the ballots to affected members, violated the duty of fair representation. Plaintiffs are correct that Section 33(a)(1)(B) provides the general committees shall prepare the ballots and that the recommendations of committee chairs shall accompany the ballot along with the International's recommendation. It is also undisputed that in this election the ballots and the International's recommendations were instead sent by the International and without recommendations of general committee chairs.

Defendants offer several reasons for these departures, including that some of the general committee chairs asked the International to distribute the ballot, general chairs could not agree on recommendations, and the International had distributed the ballots for previous mergers. Moreover, committee chairs were apparently still able to communicate their recommendations to members by doing so directly; plaintiffs have not asserted defendants attempted to prevent such contact in any way. There is also no evidence these departures were undertaken in a way that is arbitrary, discriminatory, or in bad faith. *Rucker,* 917 F.2d at 1238.

In light of the broad scale of the consolidation undertaken here and the ability of committee chairs to make their views known, we believe these departures from constitutional procedure are within the bounds of reasonableness as constrained by the deference we must give to a union's interpretation of its constitution and union conduct with regard to its own internal affairs. *Fulk,* 160 F.3d at 407-08. We conclude that although the election procedure departed somewhat from the strictures of Section 33, plaintiffs have not shown the union violated its duty of fair representation with these fairly minor derogations.

## IV.

## PLAINTIFFS' REMAINING CLAIMS

Relying on the same facts, as well as the same interpretation of the BLE constitution, plaintiffs contend the union's internal restructuring violated two provisions of the Labor Management Reporting and Disclosure Act. The first is Section 101(a)(1) of the Act, which grants union members "equal rights and privileges ... to nominate candidates, to vote in elections or referendums ..., to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings...." 29 U.S.C. § 411(a)(1).

The magistrate judge rejected plaintiffs' claim,

reasoning that any infringement of the statute "must be predicated on some form of discrimination." Aplt.App., vol. V at 831. The judge found that plaintiffs had failed to allege facts showing they were "treated differently than other union members with regard to their opportunity to vote on the recommended merger of General Committees." *Id.* at 832. She made the same finding with respect to the plaintiffs' right to pursue an administrative appeal of the merger. *Id.* The district court adopted these findings in full. We agree. The magistrate judge correctly interpreted the governing law and properly applied that law to the facts. *See Calhoon v. Harvey,* 379 U.S. 134, 138-39 (1964) (Section 101(a) is "no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote.").

The district court, acting again on a recommendation from the magistrate judge, also was correct in rejecting plaintiffs' second claim under the Labor Management Reporting and Disclosure Act, this one resting on Section 101(a)(2) of the Act. That section protects union members' "right to meet and assemble freely with other members; and to express any views, arguments, or opinions." 29 U.S.C. § 411(a)(2). The record contains no evidence to support plaintiffs' claim under this statute.

Finally, the magistrate judge and the district court both ruled that plaintiffs' state law claims

were preempted by the Railway Labor Act. Plaintiffs do not quarrel with this conclusion, and we therefore conclude they have waived their state law claims. *See State Farm Fire & Cas. Co. v. Mhoon,* 31 F.3d 979, 984 n. 7 (10th Cir.1994) (failure to raise an issue in the opening brief waives the issue).

We AFFIRM the judgment of the United States District Court.

STANDING RULES

**Authority of International President in Mergers, etc. with Protective Agreements**

Note: The term "Mergers, etc.," as referred to in subtitle and as hereinafter expressed in this section, means--mergers, consolidations, coordinations, control, absorptions, diversions of traffic, purchases or any other action whereby separate facilities or operations of railroads are going to be unified.

Section 33.(a)(1) Mergers, etc.

When the International President has sufficient information that a merger, consolidation, coordination, control, absorption, diversion of traffic, purchase or any other action whereby separate facilities or operations of railroads are going to be unified, he shall immediately assign an officer for the purpose of directing the committees in the handling to the best interests of the members involved.

A. Contracts

A. There shall be a revision of the existing agreements on the properties involved which will have for its purpose the consolidation of contracts covering the merged, etc. property.

B. The assigned officer, in conjunction with the interested general chairmen, shall represent all of

the committees in negotiations with the carrier and/or carriers.

C. Contracts shall be ratified by a majority vote of the active members casing a ballot.

B. General Committees

The committees involved on the merged systems may be consolidated, if necessary, to meet the representational requirements of the membership.

The officer assigned shall submit his recommendations to the International President. If the recommendation is to merge the involved committees, the International President shall forward said recommendation with all facts in support to the involved general committees. The affected general committee(s) shall refer the question to the membership under their jurisdiction by instructing each affected division to prepare a paper ballot to be delivered within sixty (60) days to each member of the division, by government mail, directed to his/her last known address. The ballot, with a large envelope, approximately 4 x 9 1/2 inches, which must contain space for the member's name and address, must have first class postage affixed thereto and must contain the division number and address for returning the ballot. The ballot and return envelope must also be accompanied with the written recommendation of the International President, the written recommendation of the affected general chairmen, and written instructions showing purpose of the ballot, time, date and place for counting the ballots. The ballot shall also contain a signature and date line, which must be

signed and dated by the member. The return envelope containing the ballot must be returned and postmarked within fifteen (15) days from the postmarked date on the envelope sent to the member. The ballots shall be counted by each division at the first regular division meeting following the date for return of the ballots. Each division secretary- treasurer will notify the general chairman of the results from the ballots received within ten (10) days. The affected general chairmen will forward this information to the International President and the other affected general chairmen within thirty (30) days from date received from last division reporting. If the decision of the majority is to merge the committees in question, the International President shall notify the affected general committees of the decision and instruct the merged committees to meet within ninety (90) days for the purpose of electing new officers, as provided in Section 9--Standing Rules, and conducting any business or grievance that may properly come before the body. The new date to meet regularly shall be decided as per Section 8--Standing Rules. If it is the decision of the majority not to merge their GCA's, their individual CGA's shall continue as heretofore.

C. Divisions

Representation

The general committee or general chairman and division or divisions affected shall, after the determination has been made relative to a merged seniority district or districts, make a study of the BLE divisions in the affected are for the

purpose of reducing, if possible, the number thereof to only those necessary to maintain an efficient operation.

The general committee or general chairman and divisions affected shall give consideration to the following points as a guideline for making such a determination:

a. The number of members in a division.

b. The location of the majority of the member's place of residence.

c. The availability of the majority of the members to attend the division meeting place.

d. The location of the operating division offices nearest the BLE division.

Changes as referred to in the above paragraph shall not be put into effect by a general committee or general chairman until the proposed changes have been submitted to the Executive Committee of the ID and approved.

II. Jurisdiction

Should it be, in the judgment of the general committee or general chairman and divisions affected, that more than one BLE division is

necessary on a seniority district, and said BLE divisions have been set up, each division shall be given a definite territory by the general committee and/or the general chairman. Elections to all offices of each division shall be held immediately after they have been set up, provided divisions have been merged or a new division has been created.

Should the GCA and divisions fail to reach an amicable agreement in the merging of and/or creating a new division within sixty (60) days, the matter shall be referred to the International President who shall, upon receipt thereof, make an investigation of the facts within thirty (30) days, after which the Executive Committee of the ID shall make a recommendation thereon, which
shall be final and binding.